No. 76-556

In the Supreme Court of the United States

OCTOBER TERM, 1976

BRINKE TRANSPORTATION CORPORATION, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioners contend that the court of appeals abused its discretion in denying, without hearing oral argument, petitioners' motion for an interlocutory injunction against the operation of an order of the Interstate Commerce Commission pending the court of appeals' determination of a petition to review that order.

Petitioner Brinke Transportation Corporation holds a permit authorizing it to operate in interstate commerce as a freight forwarder through the use of trailer-on-flatcar (TOFC) service of common carriers by railroad. In November 1975, two competing freight forwarders filed with the Commission a petition seeking clarification of Brinke's permit, in which they argued that Brinke was

unlawfully using motor common carriers for line-haul transportation despite the apparent limitation in Brinke's permit to the use of rail TOFC service. Brinke responded that its permit limitation is satisfied so long as a *portion* of every shipment moves by rail TOFC service (Pet. App. 2a-3a).

The Commission found that Brinke's permit authorizes it to use, "for line-haul transportation, *only* * * * the trailer-on-flatcar service of common carriers by railroad" (Pet. App. 3a; emphasis in original). The Commission accordingly "advised and cautioned [Brinke] to confine its operations to those authorized by its permit as clarified" by the Commission (Pet. App. 4a).[1]

Petitioners then filed a petition to review the Commission's order and sought an interlocutory injunction pending the court of appeals' disposition of the case. The court initially issued a temporary stay but subsequently vacated the stay and denied petitioners' application for an interlocutory injunction pending review (Pet. App. 1a).

Petitioners here seek review of the order denying the application for an interlocutory injunction. The petition presents no question warranting review by this Court.

1. Where, as here, a court of appeals has denied an application for a stay or injunction pending the completion of the appellate processes, an applicant has a "heavy burden" (*Board of Education* v. *Taylor*, 82 S. Ct. 10, 11, Mr. Justice Brennan as Circuit Justice) to make "an extraordinary showing" and to present "very cogent reasons" (*Magnum Import Co.* v. *Coty*, 262 U.S.

[1]The Commission thereafter denied a petition for reconsideration (Pet. App. 5a).

159, 164) in support of its request that this Court "disregard the deliberate action" of the court of appeals (*ibid.*).

The burden applies with special force in a case like this one, where an injunction is sought pending an appeal or a petition to review in the court of appeals. Since the court of appeals declined to issue an injunction "in aid of its own jurisdiction," its decision "is entitled to great weight"; the standard is whether "the Court of Appeals abused its discretion" (*Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1314-1315, Mr. Justice Marshall as Circuit Justice).

There is no dispute here over the proper standards to be applied by a court in determining whether an injunction pending appeal should be issued. We agree with petitioners (Pet. 6-7) that the governing criteria are those stated in *Virginia Petroleum Jobbers Association* v. *Federal Power Commission*, 259 F. 2d 921, 925 (C.A.D.C.). Whether petitioners have made the required "extraordinary showing" (*Magnum Import Co.* v. *Coty*, *supra*, 262 U.S. at 164) that the court of appeals abused its discretion in applying the governing standards in the peculiar circumstances of this case—a burden that they have not come close to satisfying[2]—does not warrant review by this Court on certiorari.

[2]First, there is little likelihood that petitioners will prevail in the court of appeals. The Commission's interpretation of an unambiguous permit will not be overturned unless it is deemed clearly erroneous. *Service Transfer Co.* v. *Virginia*, 359 U.S. 171, 177-178; *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, 557-558. Second, the only injury that petitioners contend they will suffer is the loss of revenues from freight forwarding operations that the Commission has found to be unlawful. Third, issuance of an injunction to allow petitioners to continue the unauthorized operations would divert from petitioners' competitors traffic that those freight

2. Petitioners also appear to contend (Pet. 13) that the court of appeals was required to hear oral argument on the application for an interlocutory injunction. Petitioners have no constitutional or statutory right to present oral argument in connection with such an application. The Federal Rules of Appellate Procedure do not contemplate routine oral argument on preliminary motions (see Rules 18 and 27), and it is common procedure for the courts of appeals to dispose of such motions without hearing argument. See, *e.g.*, Fifth Circuit Local Rule 10(c); *Krakoff* v. *United States*, 431 F. 2d 847 (C.A. 6). Petitioners have not shown that the court of appeals abused its discretion in this case by following that common procedure.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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forwarders could lawfully handle under their own permits. Fourth, the public interest would not be served by permitting a continuation of freight forwarding operations that have not been authorized by the Commission and that are therefore unlawful under the Interstate Commerce Act.

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